CITATION: Magder v. Ford, 2013 ONSC 263
DIVISIONAL COURT FILE NO.: 560/12
DATE: 20130725

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN R.S.J., LEITCH, AND SWINTON JJ.

B E T W E E N:

PAUL MAGDER Applicant (Respondent on Appeal)	*Clayton C. Ruby, Nader R. Hassan and Angela Chaisson*, for the Applicant (Respondent on Appeal)
- and -	
ROBERT FORD Respondent (Appellant)	*Alan J. Lenczner Q.C. and Andrew Parley*, for the Respondent (Appellant)
	HEARD at Toronto: January 7, 2013

By The Court:

Overview

[1] Robert Ford appeals the decision of Hackland R.S.J. dated November 26, 2012 which held that Mr. Ford contravened s. 5 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("*MCIA*") and declared that Mr. Ford's seat as Mayor of the City of Toronto was vacant. This appeal raises important issues about the application of the City's *Code of Conduct*, its interaction with the *MCIA*, and the application of provisions of the *MCIA*.

[2] For the reasons that follow, we conclude that the application judge erred in finding that Mr. Ford contravened the *MCIA*. Accordingly, we would allow the appeal.

The Legislative Context

The Municipal Conflict of Interest Act

[3] At the centre of this appeal is the application of the *MCIA*, legislation first adopted in 1972. The key provision for purposes of this appeal is s. 5(1), which sets out the duty of a member (defined in the *MCIA* as a member of a council or local board) when he or she has a "pecuniary interest" in a matter under consideration by a municipal council or a local board at a meeting where the member is present:

> Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,
>
> (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
>
> (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
>
> (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

[4] Subsection 5(2) additionally requires the member to forthwith leave the meeting or part of the meeting during which the matter is under consideration, unless the meeting is open to the public.

[5] Sections 2 and 3 clarify what constitutes a "pecuniary interest", although the term is not specifically defined. Section 3 deems the interest of certain family members to be those of the member, while s. 2 defines an "indirect pecuniary interest" as follows:

> For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,
>
> (a) the member or his or her nominee,
>
> (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,
>
> (ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or
>
> (iii) is a member of a body,
>
> that has a pecuniary interest in the matter; or
>
> (b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter.

[6] Case law has determined that a pecuniary interest for purposes of the *MCIA* is a financial or economic interest. For the *MCIA* to apply, the matter to be voted upon by council must have

the potential to affect the pecuniary interest of the municipal councillor (*Re Greene and Borins* (1985), 50 O.R. (2d) 513 (Div. Ct.) at p. 8 (Quicklaw version)).

[7] Section 4 sets out a number of exemptions from s. 5, only two of which are relevant in this appeal. It states that "[s]ection 5 does not apply to a pecuniary interest that a member may have":

> (i) in respect of an allowance for attendance at meetings, or any other allowance, honorarium, remuneration, salary or benefit to which the member may be entitled by reason of being a member or as a member of a volunteer fire brigade, as the case may be; ...
>
> (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

[8] The *MCIA* allows an elector to bring an application before a judge of the Superior Court of Justice seeking a determination whether a member has contravened s. 5. If there has been a contravention of s. 5, s. 10(1) of the *MCIA* requires the judge to declare the member's seat vacant. As well, the judge can impose a further period of disqualification from office and order restitution where there has been personal financial gain. However, there is a saving provision in s. 10(2) if the contravention was the result of inadvertence or an error in judgment. That provision reads:

> Where the judge determines that a member or a former member while he or she was a member has contravened subsection 5 (1), (2) or (3), if the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment, the member is not subject to having his or her seat declared vacant and the member or former member is not subject to being disqualified as a member, as provided by subsection (1).

The City's Code of Conduct

[9] The other relevant legislative measure in this appeal is the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Schedule A ("*COTA*"). Section 157(1) requires the City to establish codes of conducts for members of city council and of local boards.

[10] Subsection 157(2) makes reference to ss. 7 and 8. Section 7 states that the City "has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act." Section 8 allows the City to provide any service or thing that the City considers necessary or desirable for the public. Subsection 157(2) then states,

> Without limiting sections 7 and 8, those sections authorize the City to establish codes of conduct for members of city council and of local boards (restricted definition) of the City.

[11] Subsection 157(3) imposes a limitation, providing that a by-law "cannot provide that a member who contravenes a code of conduct is guilty of an offence."

[12] Subsection 158(1) requires the City to appoint an Integrity Commissioner, who reports to City Council. The Commissioner's responsibilities are set out in s. 159, while s. 160 deals with inquiries by the Commissioner. A request for an inquiry into a contravention of a code of conduct can be made by city council, a member of council or a member of the public.

[13] Subsection 160(5) of the *COTA* deals with penalties, stating:

> City council may impose either of the following penalties on a member of council or of a local board (restricted definition) if the Commissioner reports to council that, in his or her opinion, the member has contravened the code of conduct:
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> 1. A reprimand.
>
> 2. Suspension of the remuneration paid to the member in respect of his or her services as a member of council or of the local board, as the case may be, for a period of up to 90 days.

[14] The City of Toronto has adopted a detailed *Code of Conduct* ("the *Code*") for members of Council and citizen members of local boards. The *Code* explicitly states that it is intended to supplement and be compatible with laws governing the conduct of members, including the *MCIA* (see pp. 3 and 4 of the *Code*).

[15] The *Code* governs a variety of matters, including gifts and benefits, confidential information, use of city property and resources, and improper use of influence. Article XVIII, "Compliance with the Code of Conduct", states that s. 160(5) of the *COTA* allows Council to impose either of two penalties on a member: a reprimand or a suspension of remuneration. The section then speaks of "Other Actions", stating that the Integrity Commissioner may recommend "the following actions" to Council:

> 1. Removal from membership of a Committee or local board (restricted definition).
> 2. Removal as Chair of a Committee or local board (restricted definition).
> 3. Repayment or reimbursement of moneys received.
> 4. Return of property or reimbursement of its value.
> 5. A request for an apology to Council, the complainant, or both.

The Factual Background

[16] The appellant, Robert Ford, has served on Toronto City Council for over 12 years. He was elected Mayor in 2010.

[17] At issue in this application and appeal is the conduct of Mr. Ford on February 7, 2012. However, to understand the events on that day, one must begin with consideration of a report of the Integrity Commissioner dated August 12, 2010. In that report, she found that Mr. Ford, as a

member of Council, breached three articles of the *Code* dealing with gifts and benefits, use of city property, services and resources and improper use of influence. The breaches occurred because of Mr. Ford's use of the City of Toronto logo, City staff, and his status as a councillor to solicit funds for a charitable foundation, the Rob Ford Football Foundation, which he had established to fund the purchase of football equipment for high school football teams.

[18] Under a heading of the report entitled "Appropriate Sanction", the Integrity Commissioner discussed alternatives and recommended what she called "the following sanction": that Mr. Ford repay donations received from lobbyists and a corporation engaged in business with the City in the amount of $3,150.00. At p. 16 of the report, she stated,

> Such a sanction would convey Council's expectation that Councillor Ford is responsible for ensuring that he does not ask for or receive benefits in violation of the *Code of Conduct* and that he will be held accountable by Council for such violations. It would also reflect the importance of a Councillor not using the influence of office for personal causes.

[19] This report was tabled at a City Council meeting on August 25, 2010 and approved without debate. As a result, City Council adopted the finding of the Integrity Commissioner that Mr. Ford had violated three provisions of the *Code* and adopted the recommendation respecting sanction (asserting that it was permitted by Article XVIII of the *Code*), with the added requirement that Mr. Ford provide proof of reimbursement to the Integrity Commissioner ("Decision CC 52.1").

[20] Later in the meeting, Councillor Del Grande brought forward a motion to reconsider Decision CC 52.1. Speaker Sandra Bussin observed that the matter dealt with an issue regarding Mr. Ford's conduct and asked Mr. Ford if he intended to declare a conflict. Mr. Ford indicated that he would be voting and proceeded to do so. The motion was defeated.

[21] After a number of attempts to obtain information about Mr. Ford's compliance with Decision CC 52.1, the Integrity Commissioner issued a report on compliance dated January 30, 2012. In it, she described her efforts to obtain information from Mr. Ford and made the following recommendation, which came before City Council on February 7, 2012:

> 1. City Council adopt a recommendation that Mayor Ford provide proof of reimbursement as required by Council decision CC 52.1 to the Integrity Commissioner on or before March 6, 2012, and
>
> 2. City Council adopt the recommendation that if proof of reimbursement has not been made by March 6, 2012, that the Integrity Commissioner report back to Council.

[22] During the meeting of City Council on February 7, 2012, Mr. Ford spoke to the report of the Integrity Commissioner, explaining how his football foundation worked. For example, he told how he was then soliciting funds and stated that he no longer used the City logo or the Mayor's letterhead or City staff in his fund raising efforts. Any funds solicited have always been

paid to the Toronto Community Foundation, an arm's length entity that issues tax receipts to donors and administers the charity's funds. Mr. Ford can direct payment to high schools seeking financial assistance in purchasing football equipment, and funds are paid to them by the Toronto Community Foundation. He explained that he never received any of the donors' funds. He also explained that he had written to the donors identified by the Integrity Commissioner to ask whether they wished a return of their funds, and three of the eleven had indicated that they did not want to be reimbursed.

[23] Later in the meeting, and before a vote on the Integrity Commissioner's January 30, 2012 report, Councillor Ainslie made a motion to rescind Council's Decision CC 52.1. Mr. Ford did not speak to this motion, although he voted in favour of it. The motion passed, with the result that Decision CC 52.1 was rescinded, and Mr. Ford was no longer required to repay any money to donors.

The *MCIA* Application

[24] Mr. Ford's participation in the February 7, 2012 meeting of Council led the respondent, Paul Magder, to initiate an application under the *MCIA*.

[25] The application judge found that Mr. Ford had violated s. 5(1) of the *MCIA* by speaking and voting in the meeting. He concluded that s. 4(k) did not exempt the conduct, as the amount in issue was not insignificant. He also concluded that s. 10(2) did not provide a defense, as Mr. Ford had not committed a *bona fide* error in judgment. Rather, he had been wilfully blind as to his obligations under the *MCIA*. Therefore, the application judge declared Mr. Ford's post as Mayor vacant, although he imposed no further period of disqualification.

[26] Mr. Ford now appeals that decision. A stay of the judgment has been granted pending the outcome of this appeal.

The Standard of Review on Appeal

[27] An appeal lies to the Divisional Court pursuant to s. 11(1) of the *MCIA*. While some judges of the Divisional Court have approached an appeal under the *MCIA* as if it were a hearing *de novo*, we agree with the recent decision of the Divisional Court in *Amaral v. Kennedy*, 2012 ONSC 1334 that such an appeal is not a hearing *de novo* (at para. 11).

[28] As this is an appeal from a judicial decision, the standard of review on questions of law is correctness. The standard of review on questions of fact is palpable and overriding error. On questions of mixed fact and law, the standard is correctness if there is an extricable error of law (*Housen v. Nikolaisen,* [2002] 2 S.C.R. 235 at paras. 8, 10, and 36).

The Issues on this Appeal

[29] This appeal is about the correctness of the legal determinations made under the *MCIA* with respect to Mr. Ford's conduct in speaking and voting on February 7, 2012. The appeal, like the application, is primarily concerned with the question whether Mr. Ford had a pecuniary

interest that barred him from participating in the discussion of the Integrity Commissioner's recommendations in her January 30, 2012 report and the vote to rescind Council's Decision CC 52.1.

[30] The appellant raises the following issues:

> 1. Did the application judge err in law in failing to find the City Council resolution of August 25, 2010 [Decision CC 52.1] was *ultra vires* and, therefore, a nullity?
>
> 2. Did the application judge err in finding that s. 5(1) of the *MCIA* applies when Council is dealing with councillor misconduct under the *Code of Conduct*?
>
> 3. Did the application judge apply the wrong test to the exemption in s. 4(k) of the *MCIA*?
>
> 4. Did the application judge err in law in failing to find an error of judgment pursuant to s. 10(2) of the *MCIA*?

[31] While the appellant framed the issues in this order, for purposes of these reasons, we will deal first with issue 2, the application of the *MCIA*, before considering issue 1, the *ultra vires* question. We will then deal with the respondent's argument that the attack on the validity of Decision CC 52.1 is an impermissible collateral attack. Lastly, we will deal with issues 3 and 4.

Did the application judge err in finding that s. 5(1) of the *MCIA* applies when Council is dealing with councillor misconduct under the *Code of Conduct*?

[32] The appellant argues that the *MCIA* does not apply to a *Code* violation. He argues that the purpose of the *MCIA* is to provide transparency in municipal decision making respecting business or commercial matters that involve the City. In contrast, the *Code* is concerned with councillor misconduct and the actions to be taken if there is a contravention of the *Code*. The two regimes are, in effect, "two silos", addressed to different matters and attracting different consequences for contraventions.

[33] The appellant also argues that the application judge should have interpreted the *MCIA* narrowly, because it is a penal statute (see *Mangano v.* Moscoe, [1991] O.J. No. 1257 (Gen. Div.) at paras. 4 – 6).

[34] In our view, the interpretation of the *MCIA* requires a court to apply the modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26: the words of the statute are to be read in context and "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The principle that penal statutes are to be strictly construed applies only where there is ambiguity about the meaning of a statutory provision (at para. 28).

[35] In our view, the application judge was correct when he held that the *MCIA* applies to a *Code* matter before Council, provided that the council member has a pecuniary interest in that matter. The words of s. 5(1) are clear: the member shall disclose a pecuniary interest in any matter before Council, and he or she shall not take part in discussion or a vote on the matter.

[36] There is no suggestion in the wording of the *MCIA* that it is limited to situations where the City has a financial interest, although it is true that in most of the decided cases, financial or commercial interests of the City were involved: for example, *Re Blake and Watts* (1973), 2 O.R. (2d) 43 (Co. Ct.) (remission of a portion of a tax levy by the City); *Baillargeon v. Carroll*, [2009] O.J. No. 502 (S.C.J.) (voting on a budget matter involving teachers when the member's daughter was a teacher); and *Tuchenhagen v. Mondoux*, [2011] O.J. No. 4801 (Div. Ct.) (sale of a parcel of land by the City), among others. However, the language of the *MCIA* does not limit the application of s. 5(1) to a situation where the City is conducting business or entering into contracts, as the appellant suggests. Nor, in our view, do the excerpts from the legislative debates assist in the interpretation of the provision.

[37] Moreover, a purposive analysis does not lead to the narrow reading urged by the appellant. A major purpose of the *MCIA* is to promote transparency in municipal decision making by requiring the councillor to declare a conflict when he or she has a pecuniary interest at stake. However, the legislation is also designed to prevent the conflict in interest that would arise if a member were to vote when he or she could benefit financially from the outcome of the Council decision. As the Divisional Court stated many years ago in *Moll v. Fisher* (1979), 23 O.R. (2d) 609 at p. 4 (Quicklaw version):

> ... the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

[38] Therefore, where a matter involving councillor misconduct is before Council and the resolution proposed engages the councillor's pecuniary interest because of proposed financial repercussions or sanctions, s. 5(1) of the *MCIA* is engaged.

[39] Clearly, this reading of the *MCIA* raises concerns about procedural fairness for the council member, as the application judge discussed in his reasons. Even though a member's conduct is in issue and he or she faces a potential financial sanction, s. 5(1) precludes the member from making submissions to Council, which is the ultimate decision-maker. In the usual case, the duty of procedural fairness would require that an individual, faced with a sanction for misconduct, be given an opportunity to respond to the allegations made or the sanction to be imposed.

[40] For this reason, Commissioner Douglas Cunningham in the report of the Mississauga Judicial Inquiry, *Updating the ethical infrastructure* (2011), recommended that the *MCIA* be amended to recognize the right of a member to make submissions where the report of an Integrity Commissioner contemplates a penalty under a code of conduct (at p. 173). However, such an amendment has not been enacted, and the courts cannot read such a right into the *MCIA*.

[41] While we agree with the application judge that the *MCIA* can apply to *Code* matters, it does so only if the member has a direct or indirect "pecuniary interest" in the matter before Council. Therefore, to determine whether there has been a contravention of s. 5(1), one must begin with an inquiry into the matter before Council.

[42] In our view, it is not correct, as the respondent argues and the application judge appears to have accepted (Reasons at para. 15), that a member is precluded from speaking whenever a *Code* violation is before the Council, just because Council has the power to impose a financial penalty. The pecuniary interest of the member must be a real one. Unless the report of the Integrity Commissioner recommends an economic sanction, or if there is some real likelihood that a financial penalty is contemplated, the member is not precluded from speaking to a report on his conduct. There is no reason to preclude a member from speaking to a report recommending a reprimand or requesting an apology. Given the importance of procedural fairness and especially the right to be heard, the individual should not be precluded from speaking, absent a real financial interest that has crystallized.

[43] Moreover, since a pecuniary interest results in a prohibition against participation in a public meeting which, if not obeyed, attracts a severe penalty, it is appropriate to strictly interpret the pecuniary interest threshold.

[44] On February 7, 2012, City Council was asked to accept the Integrity Commissioner's recommendation in her January 30, 2012 report that Mr. Ford be required to report on his compliance with Decision CC 52.1 by March 6, 2012. Her report recommended that Council fix a date for compliance, but it did not recommend any further sanction. Thus, the matter before City Council was the extent of Mr. Ford's compliance with Decision CC 52.1 and the question whether to require a deadline for compliance.

[45] Did Mr. Ford have a pecuniary interest in that matter? In our view, he did not. The financial sanction had already been imposed in August 2010 by virtue of Decision CC 52.1. The issue before Council was Mr. Ford's conduct since Decision CC 52.1 was adopted. There was no financial sanction contemplated by the January 30, 2012 report before Council at the meeting on February 7, 2012. Indeed, the report states, under "financial impact", that it "will have no financial impact on the City of Toronto". It is noteworthy that, in contrast, the August 2010 report stated, "This report will have no financial impact on the City of Toronto. It may have a financial impact on Councillor Rob Ford." Therefore, the application judge erred when he found that Mr. Ford contravened s. 5(1) when he spoke at the meeting of February 7, 2012.

[46] However, the matter before Council changed when thereafter a motion was made to rescind Decision CC 52.1. From that point, Mr. Ford clearly had a pecuniary interest in the matter before Council, as he would be relieved of the reimbursement obligation if the motion passed. Therefore, the application judge correctly found that Mr. Ford had a direct pecuniary interest when he voted on that motion, and s. 5(1) of the *MCIA* was engaged.

[47] Nevertheless, as set out in the following section of these reasons, it is our view that Mr. Ford did not contravene s. 5(1), because the financial sanction imposed by Decision CC 52.1 was not authorized by the *COTA* or the *Code*. In other words, it was a nullity.

Did the application judge err in law in failing to find the City Council resolution of August 25, 2010 [Decision CC 52.1] was *ultra vires* and, therefore, a nullity?

[48] The appellant argues that the application judge erred in failing to find Decision CC 52.1 was *ultra vires* because it imposed a sanction - reimbursement of funds to certain donors - that was not authorized by the provisions of the *COTA*. That Act, in s. 160(5), permits only one of two penalties or sanctions: a reprimand or a suspension of remuneration.

[49] Alternatively, the appellant argues that the sanction was not authorized by the *Code*, which allows the Integrity Commissioner to recommend the "repayment or reimbursement of moneys *received*" (emphasis added). The appellant argues that he never personally received any of the money paid by donors, as the money went directly to the Toronto Community Foundation for purposes of his charitable foundation. All the funds were paid to the Toronto Community Foundation and then used to purchase football equipment for schools on presentation of an invoice.

[50] The respondent argues that the sanctions were authorized by the *COTA*, as a broad and generous reading of the regulatory powers of the municipality justifies the adoption of a range of remedial measures in the *Code*, including an order for the repayment of money. As well, the respondent argues that it is inappropriate for a court, on an application under the *MCIA*, to consider the legality of Decision CC 52.1, as this amounts to an improper collateral attack on the decision of Council.

Is the appellant making an improper collateral attack on Decision CC 52.1?

[51] The respondent argues that the appellant is precluded from raising the validity of the Council's reimbursement order in Decision CC 52.1, as this is an impermissible collateral attack on that decision and the findings of the Integrity Commissioner. He is said to be precluded from raising this issue, because he never sought judicial review of Decision CC 52.1.

[52] In fact, the appellant makes no attack on any finding by the Integrity Commissioner, as the Commissioner's authority is limited to making recommendations to Council, and it is Council that ultimately makes a decision. It is Decision CC 52.1 that is under attack and, more specifically, only the financial sanction imposed pursuant to that decision.

[53] "Collateral attack" is well defined in the following excerpt from Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis), p. 463:

> Collateral attack cases involve a party, bound by an order, who seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.

[54] In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, McIntyre J., dealing with a collateral attack on a superior court order, stated (at p. 599):

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[55] The appellant emphasizes the words in the first sentence of this quotation that show a court order stands, provided the court had jurisdiction to make the order. As Lange states, above at p. 464, "Where the judgment is attacked for lack of jurisdiction, there is no collateral attack because the validity of the judgment, and its binding effect, is in question." The appellant argues that the rule against collateral attack does not apply in the present case, because the financial sanction imposed by Decision CC 52.1 was made without jurisdiction. It is, therefore, a nullity, and he is not precluded from relying on its invalidity in defence to the respondent's application under the *MCIA*. In other words, he had no pecuniary interest when he voted on February 7, 2012, because the financial sanction in Decision CC 52.1 was a nullity.

[56] The respondent relies on *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, which dealt with a collateral attack on an administrative order made under environmental protection legislation. The Supreme Court framed the issue before it to be "whether a penal court, which is not necessarily a superior court, can determine the validity of an administrative order when the case before it concerns primarily a charge of a penal nature" (at p. 719). In answering that question, the Court inquired into the legislature's intention as to the appropriate forum to challenge the validity of the administrative order.

[57] In the course of its reasons, the Supreme Court also adopted five factors enunciated by Laskin J.A. in the Court of Appeal in that case, with some refinement, as relevant considerations in determining whether a penal court could determine the validity of an administrative order. One of those factors was the penalty on conviction for failing to comply with the order (at p. 728). The Court determined that the fines set out in the legislation before it were "not sufficient to justify a conclusion that the legislature's intention was to authorize collateral attacks to the detriment of the Act's objectives and the Board's jurisdiction" (at p. 736).

[58] The present case does not engage the issue of legislative intention raised in *Maybrun*, as there is no competing appeal or review mechanism established by the Legislature to determine the validity of Council's order. Although an application for judicial review of Decision CC 52.1 would have been a possible remedy, this is not a situation where the legislation authorizes another tribunal to deal with the validity of the *Code* or Council's decision. Moreover, in the present case, the appellant faces a very severe penalty under the *MCIA* if he contravenes s. 5(1) by speaking or voting on a matter that affects his pecuniary interest. Indeed, the penalty of removal from office has been described as "draconian". Finally, and most importantly, the appellant argues that the Council had no jurisdiction to impose the sanction that it adopted in Decision CC 52.1.

[59] Given these considerations, we are satisfied that the doctrine of collateral attack does not prevent the appellant from challenging the validity of Decision CC 52.1 in this proceeding under the *MCIA*.

Was the August 25, 2010 resolution of Council [Decision CC 52.1] a nullity?

[60] In order to determine this issue, it is necessary to consider a number of provisions of the *COTA*. As quoted earlier in these reasons, s. 160(5) permits Council to "impose either of the following penalties", a reprimand or a suspension of remuneration, if the Integrity Commissioner reports that a member has contravened the *Code*.

[61] Subsection 6(1) of the *COTA* provides that the powers of the City "shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues." As mentioned earlier in these reasons, s. 7 provides that the City has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority, while s. 8(1) allows the City to provide any service or thing that it considers necessary or desirable for the public.

[62] The application judge held that Decision CC 52.1 was valid. He described the "Other Actions" in the *Code* as "a range of proportionate and necessary remedial measures" to address a *Code* violation (Reasons at para. 36). In coming to this conclusion, he cited two cases of the Supreme Court of Canada, *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 and *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 for the proposition that courts should adopt a generous interpretation of municipal powers. He concluded that the reimbursement obligation in the *Code* "is properly and logically connected to the permissible objectives of the City of Toronto in establishing its *Code of Conduct*" and, therefore, is valid.

[63] It is true that the Supreme Court of Canada has adopted a generous or benevolent approach to the interpretation of municipal regulatory powers with the *Nanaimo* decision (see *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.) at para. 17). However, there are other important cases in which the Supreme Court of Canada has discussed the proper judicial approach to the determination of the validity of municipal action.

[64] The Supreme Court has never departed from a case relied upon by the appellant, *R. v. Greenbaum,* [1993] 1 S.C.R. 674, where the Court stated (at para. 22):

> Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute...

[65] More recently, in *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, the Supreme Court of Canada discussed the approach to the interpretation of general powers accorded to municipalities, such as a power to legislate for the peace, order and welfare of citizens, and the interaction of such general powers with more specific powers. Citing

Greenbaum, the Supreme Court stated that "when specific powers have been provided for, the general power should not be used to extend the clear scope of the specific provisions" (at para. 51). The Court noted that its earlier decision, *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 supported this principle, commenting that that "[i]t seems clear that there is no need to resort to a general power if a specific power exists" (at para. 52).

[66] Subsection 160(5) of the *COTA* states that City Council may impose "either of the following penalties" if the Integrity Commission reports that a member has contravened the *Code.* The French version of the *COTA* provides that Council "peut infliger ... l'une ou l'autre des sanctions suivantes". The literal reading of both versions of the provision is that there are only two sanctions or penalties that Council can impose for a breach of the *Code*.

[67] That is not to say that the *COTA* precludes other remedial measures to carry out the objectives of a *Code*. For example, the Toronto *Code* permits the Integrity Commissioner to recommend "Other Actions". Those "Other Actions" include a request for an apology. Such a request is not in and of itself a penalty or sanction. In some cases, an apology would be a reasonable and efficacious way to deal with an infraction of the *Code*, rather than to penalize with a reprimand or suspension. Similarly, a request to return City property if someone used it improperly may be a remedial measure. We agree with the application judge that a generous reading of the City's power to pass a code of conduct, in accordance with s. 6(1) of the *COTA*, would support the validity of including remedial measures in such a code. We need not determine the precise ambit of permissible remedial measures in this appeal.

[68] What is objectionable in the present case is the fact that a so-called remedial measure is being used for a punitive purpose. In Decision CC 52.1, City Council ordered Mr. Ford to pay monies to certain donors when he had never received such monies personally. While the application judge called the reimbursement obligation a remedial measure, in our view, this was a penalty imposed on Mr. Ford. Indeed, the Integrity Commissioner described the payment as a sanction in her report. Her language in support of that sanction is the language of deterrence and denunciation, as seen in the quotation at paragraph 18 of our reasons, above. Her report was adopted by Council, and the language of sanction is found in Decision CC 52.1. Certainly, from the perspective of an individual who is required to pay monies he never received personally, this is a financial sanction or penalty.

[69] Subsection 160(5) of the *COTA* sets out a clear limit on the sanctions that Council can impose for a violation of the *Code*. Consistent with what the Supreme Court said in cases like *Spraytech* and *Montreal* above, it is inappropriate to invoke a general power found elsewhere in the *COTA* to extend the specific power conferred by the Legislature in s. 160(5). Subsection 6(1) of the *COTA*, the instruction to interpret the powers of the City broadly, does not permit such a sanction, given the clear limits in s. 160(5). Nor does s. 7 assist, which states that the City "has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act." Finally, the power in s. 8 to provide any service or thing that the City considers "necessary or desirable for the public" cannot be used to extend the sanctions that may be imposed on councillors, given the wording of s. 160(5). Accordingly, the

application judge erred in failing to find that Decision CC 52.1 was *ultra vires* by imposing a sanction not authorized by the *COTA*.

[70] In addition, Decision CC 52.1 went beyond the "Other Actions" contemplated by the *Code*, because it required Mr. Ford to reimburse funds which he never received personally. The "Other Actions" set out in the *Code* include reimbursement of monies "received". Here, the evidence is clear that Mr. Ford never personally received any of the money donated for the football foundation. All funds were received by an arm's length entity, the Toronto Community Foundation. Therefore, the sanction was not authorized by the *Code* nor by the *COTA*.

[71] While the respondent suggested that the sanction might be authorized under another part of the "Other Actions" in the *Code*, namely, "return of property or reimbursement of its value", there is nothing to suggest that the Council relied on this provision.

[72] Given that the imposition of the financial sanction under Decision CC 52.1 was a nullity because Council did not have the jurisdiction to impose such a penalty, Mr. Ford had no pecuniary interest in the matter on which he voted at Council on February 7, 2012 - namely, the revocation of the Decision CC 52.1.

[73] While the appeal could be allowed on this basis, for purposes of completeness, we will address the other issues raised.

Did the application judge apply the wrong test to the exemption in s. 4(k) of the *MCIA*?

[74] At the hearing of this appeal, the appellant also argued that the exemption in s. 4(i) should apply. That provision was not raised before the application judge, nor is it discussed in the appellant's factum. In these circumstances, we decline to deal with this issue for the first time on appeal.

[75] With respect to the application of s. 4(k), the appellant argues that the application judge erred in his application of this provision because he failed to apply an objective test. The exemption applies where the interest of the member is so "insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."

[76] The application judge observed, correctly, that s. 4(k) provides an objective standard of reasonableness. However, he found that the pecuniary interest was of significance to Mr. Ford because Mr. Ford stated to Council that he objected to paying back the money.

[77] In our view, the application judge did not err in finding the exemption did not apply. Section 4(k) exempts the member from the application of s. 5(1) if the pecuniary interest is so insignificant that the reasonable person would conclude that it would not likely have influenced the member. As this Court stated in *Amaral,* above, the reasonable person, in this context, is one who is "apprised of all the circumstances" (at para. 38).

[78] Here, no matter what the amount, Mr. Ford clearly objected to the obligation to repay. The application judge made no error in finding that a reasonable person, aware of Mr. Ford's comments, would conclude that the amount was likely to influence his actions.

[79] Moreover, the amount in issue, $3,150, was not an insignificant amount, even for a person of Mr. Ford's means. Therefore, the application judge did not err in concluding that s. 4(k) does not apply.

Did the application judge err in law in failing to find an error of judgment pursuant to s. 10(2) of the *MCIA*?

[80] The appellant argues that the application judge applied the incorrect test in determining whether the contravention of the *MCIA* was committed by reason of an error in judgment. In particular, the application judge is said to have erred in finding that Mr. Ford's wilful blindness to his obligations under the *MCIA* prevented him from claiming that he made an error in judgment within s. 10(2). It is the appellant's submission that wilful blindness is a consideration when a councillor relies on inadvertence, but is not relevant when the councillor relies on the "error in judgment" saving provision. In the latter case, the court's focus should be on honesty, candour, frankness and transparency.

[81] According to the Divisional Court in *Edwards v. Wilson* (1980), 31 O.R. (2d) 442 at para. 35, an error in judgment can arise from either a mistake of law or of fact. However, the determination of whether the error occurred honestly or in good faith is a question of fact.

[82] Therefore, this Court can interfere with the application judge's conclusion that there was no error of judgment only if the application judge made an error in the legal principles he applied, or if he made a palpable and overriding error of fact. The Ontario Court of Appeal explained the standard of a "palpable and overriding error" in *Waxman v. Waxman*, 2004 CanLII 39040 (at paras. 296 and 297):

> The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

[83] The application judge quoted from *Campbell v. Dowdall* (1992), 12 M.P.L.R. (2d) 27 (Gen. Div.) at para. 36, which sets out a test for an error in judgment that has been applied in many other cases,

> The Legislature must have intended that contraventions of s. 5 which result from honest and frank conduct, done in good faith albeit involving erroneous judgment, should not lead to municipal council seats having to be vacated. Municipal councils require the dedicated efforts of good people who will give of their time and talent for the public good. What is expected and demanded of such public service is not perfection, but it is honesty, candour and complete good faith.

[84] The application judge was aware of the appellant's submission that he had an honest belief that he could speak and vote on *Code* matters before the Council, and he made no specific adverse finding of credibility in that regard (see Reasons at para. 52). However, the application judge expanded on the concept of "good faith", as opposed to honest belief, in s. 10(2) (see Reasons at para. 53):

> The case law confirms that an error in judgment, in order to come within the saving provision in s. 10(2) of the *MCIA,* must have occurred honestly and in good faith. In this context, good faith involves such considerations as whether a reasonable explanation is offered for the respondent's conduct in speaking or voting on the resolution involving his pecuniary interest. There must be some diligence on the respondent's part; that is, some effort to understand and appreciate his obligations. Outright ignorance of the law will not suffice, nor will wilful blindness as to one's obligations.

[85] The application judge considered the evidence and concluded that Mr. Ford "gave little or no consideration to whether he was lawfully entitled to speak or vote" on February 7, 2012. He observed that Speaker Sandra Bussin had warned Mr. Ford of a possible conflict when he voted in August 2010, and Mr. Ford had no member of his staff screening for possible conflicts. He concluded that Mr. Ford's participation was "one last protest against the Integrity Commissioner's position that he profoundly disagreed with" (para. 56). Ultimately, he concluded that Mr. Ford's actions were "characterized by ignorance of the law and a lack of due diligence in securing professional advice, amounting to wilful blindness." This was "incompatible with an error in judgment" (at para. 58).

[86] The first question for this Court is whether the application judge made an error in law. The appellant is correct that there are two distinct lines of inquiry within s. 10(2): inadvertence and error of judgment. He seeks to rely on error of judgment, not inadvertence, and argues that wilful blindness should not be considered in relation to "error of judgment."

[87] In one of the early cases interpreting the *MCIA*, Killeen J. concluded that "error in judgment" was broader than "inadvertence" (*Re Blake and* Watts (1974), 2 O.R. (2d) 43 (Ont. Co. Ct.) at p7 (Quicklaw version)). He also stated that an error in judgment is to be determined on an objective standard.

[88] It is important, in the present case, not to lose sight of the nature of Mr. Ford's error in judgment. Mr. Ford argues that he made an error in law: he had a particular understanding of the reach of the *MCIA* that confined its application to situations where the City had a financial interest. In his view, the *MCIA* could not apply to a matter before Council where his personal conduct was in issue. His understanding of the *MCIA* was not correct.

[89] While he may have honestly believed his interpretation was correct, it would undermine the purposes of the *MCIA* if a subjective belief about the meaning and application of the law was sufficient to excuse a contravention of s. 5(1). When an individual seeks to rely on an error of law, good faith requires that he or she make some inquiry about the meaning and application of the law, rather than rely on his or her own interpretation. Wilful blindness to one's legal obligations cannot be a good faith error in judgment within the meaning of s. 10(2).

[90] Accordingly, in order to obtain the benefit of the saving provision in s. 10(2), the councillor must prove not only that he had an honest belief that the *MCIA* did not apply; he must also show that his belief was not arbitrary, and that he has taken some reasonable steps to inquire into his legal obligations. In our view, the application judge properly stated that it was relevant to consider the diligence of the member respecting his obligations under the *MCIA* when determining the good faith of the member – for example, his efforts to learn about his obligations and his efforts to ensure respect for them. Wilful blindness is not confined, as the appellant contends, to a consideration of inadvertence. Therefore, the appellant has demonstrated no error in law by the application judge.

[91] The remaining issue is whether the application judge made a palpable and overriding error in considering the evidence relevant to this issue. Mr. Ford gave evidence about his understanding of the *MCIA*: he thought it did not apply on February 7, 2012 because no financial interest of the City was engaged. He explained how he had followed the advice of City solicitor on numerous occasions in the past when a conflict was raised, and he noted that nothing was said by the Clerk or the City Solicitor on February 7, 2012. Moreover, Mr. Ford has declared a conflict on numerous occasions, including one during the meeting of February 7, 2012 involving the Lambton Golf Club.

[92] Mr. Ford also explained why he did not pay heed to Ms. Bussin in the August 2010 meeting, as he believed her advice could have been politically motivated. We note, as well, that when she said he might have a conflict that day, she said the conflict might be because of his conduct, and she did not mention a pecuniary interest.

[93] It is clear from the reasons of the application judge that he was aware that there was no transparency concern with respect to Mr. Ford's interests that day (see his Reasons, para. 48). The application judge was also aware of the number of times that Mr. Ford had complied with the *MCIA* by declaring a conflict of interest, and of Mr. Ford's efforts to comply with the Integrity Commissioner's directions relating to his fund raising (Reasons at para. 49).

[94] The application judge did not advert to the explanation respecting Ms. Bussin, nor did he appear to consider the context in which the infraction of s. 5(1) occurred. As we stated earlier,

the motion on which Mr. Ford voted on February 7, 2012 was not a matter placed on Council's agenda in advance. Rather, it arose during the course of the meeting.

[95] Nevertheless, even if the application judge did not mention every piece of evidence weighing in favour and against a finding of "error in judgment", the appellant has not demonstrated that the application judge made any palpable and overriding error. He heard the testimony of Mr. Ford and was in the best position to determine whether the error in judgment defence applied to the facts of this case. He did not ignore material evidence or misapprehend the evidence, and he gave careful reasons setting out the evidence he relied on to support the result. His findings are supported by the evidence. Accordingly, we would not give effect to this ground of appeal.

Conclusion

[96] In light of our conclusion that Decision CC 52.1 was a nullity because of the nature of the financial sanction it imposed, the appellant has not contravened s. 5(1) of the *MCIA*. Therefore, the appeal is allowed, the judgment of the application judge is set aside and the application under the *MCIA* is dismissed.

[97] If the parties cannot agree on costs, they may make brief written submissions through the Divisional Court Office within 30 days of the release of these reasons.

Then R.S.J.

Leitch J.

Swinton J.

Released: January 25, 2013

CITATION: Magder v. Ford, 2013 ONSC 263
DIVISIONAL COURT FILE NO.: 560/12
DATE: 20130725

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN R.S.J., LEITCH AND SWINTON JJ.

B E T W E E N:

PAUL MAGDER

Applicant (Respondent on Appeal)

- and -

ROBERT FORD

Respondent (Appellant)

REASONS FOR JUDGMENT

By The Court

Released: January 25, 2013